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No. 83-1255

In The

Supreme Court of the United States

October Term, 1983

STEPHEN J. HACKER,

Petitioner,

vs.

THE FIFTH THIRD BANK,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX FOR BRIEF IN OPPOSITION

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No. 83-1255

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APPENDIX A

83-3667

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FIFTH THIRD BANK,

Plaintiff-Appellee,

v.

STEPHEN J. HACKER,
SJH Enterprises, Inc.

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

(Filed November 29, 1983)

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. Sixth Circuit Rule 24 limits citation to specific situation. Please see Rule 24 before citing in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the court. This notice is to be *prominently* displayed if this decision is reproduced.

BEFORE: KEITH and KENNEDY,
Circuit Judges, and Gibson*

PER CURIAM. Defendants-Appellants Stephen Hacker and SJH Enterprises appeal from a district court's order which appointed a receiver to administer and protect certain collateral.

On September 21, 1983, plaintiff Fifth Third Bank filed a complaint against defendant because he was in default under the terms of his secured promissory note

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*Honorable Floyd R. Gibson, Senior Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

executed on February 28, 1983. The complaint also alleged an action against SJH Enterprises as guarantor of the note.

Along with the complaint, the Bank filed a motion to appoint a receiver to protect certain collateral which the bank feared was in jeopardy of dissipation. The defendant was notified of the hearing on the morning it was to be heard. The defendant's attorney made a motion for a continuance because the defendant was in Texas and unable to attend. The trial court denied the motion and the hearing proceeded with defendant's attorney in attendance.

The Senior Vice President of the Bank, George Schaefer, testified at the hearing that the defendant had been in default of the note since May 31, 1983. The outstanding principal balance on the note was $2,345,273. The Bank submitted evidence that twenty-five mares were to serve as collateral for the note, as were thirteen syndicate shares which represented breeding rights to certain stallions. Mr. Schaefer testified that the Bank was to receive twenty-five certificates of foal registration which represented ownership rights in the collateral. However, the Bank currently possessed only two to three of the original certificates. Without the certificates, the collateral could be sold.

Although the Bank had originally received four or five of the certificates, it had temporarily returned several of these certificates at defendant's request in order to allow defendant to race the horses. After the races were over, however, the defendant failed to return all the certificates despite the Bank's repeated request for him

to do so. The Bank also alleged that through its investigations, it discovered that some of the mares had disappeared; their whereabouts unknown. Also, several of the mares: "Pretty Sunny", "Jaka's Lady" and "Hold Your Piece" [sic] had been sold, but defendant rarely remit-(ted) the proceeds.

In the case of "Hold Your Peace", the Bank was to receive at least $40,000 from the sale but has yet to receive any of this amount. The district court, in light of the aforementioned evidence, concluded the collateral was being disposed of with only minor payments remitted to the bank, and therefore a receivership was appropriate. We affirm.

The appointment of a receiver is within the sound discretion of the trial judge. *Guy v. Citizens Fidelity Bank and Trust,* 429 F.2d 828, 833-834 (6th Cir. 1970).

Defendant's first claim that the trial judge abused his discretion by appointing a receiver without providing adequate notice and opportunity to be heard, is unpersuasive.

The defendant in fact received notice and his attorney was present at the hearing to represent him. Although the Bank's motion was scheduled for hearing only a day after it was filed and defendant was not notified until the morning it was heard, there would appear to be no basis to defendant's claim that the Bank deliberately failed to notify him of the hearing. True, the defendant was not present at the hearing, but he was represented by his attorney who had an opportunity to present evidence on the defendant's behalf.

Moreover, the trial judge informed the defendant that he would set a subsequent hearing for additional evidence at any time the defendant so requested.

Even if one were to assume that the brevity of notice substantially deprived defendant of notice and opportunity to be heard, courts have held that where there is a showing of irreparable injury, prior notice and a hearing may be postponed. *Granader v. Public Bank,* 417 F.2d 75 (6th Cir. (1969), *cert. denied,* 397 U.S. 1065 (1970); *Tennessee Public Co. v. Carpenter,* 100 F.2d 728 (6th Cir.), *cert. denied,* 306 U.S. 659 (1938).

The trial judge found that the Bank would incur irreparable injury if the receiver were not appointed. This finding appears sound. Defendant had been in default of his note and security agreement since May 31, 1983.

The Bank discovered that the "seasons" or breeding rights in the stallions which served as collateral recently had been sold. It was the Bank's understanding that defendant would receive Three Hundred Thousand ($300,000) Dollars for these "seasons" sometime during the month of September.

Also, the Bank had only two or three of the certificates of ownership. Without the certificates the Bank had no way of preventing the sale of the mares. The Bank's officer testified that some of the mares had disappeared, and the Bank did not known [sic] their whereabouts, and had not received any of the proceeds. Finally, the Bank testified that defendant had been uncooperative in his dealings with the Bank and had failed to tender the certificates of ownership despite repeated requests.

This evidence supports the trial judge's finding of irreparable harm.

Defendant's second claim is that plaintiff's complaint is for a money judgment only and therefore pre-judgment attachment is his sole form of relief. This claim is also without merit. The Bank had a properly perfected security interest in the collateral. The appointment of a receiver is permitted where the applicant has a right to, interest in, or lien upon the property in question. *Hoiles v. Watson*, 117 Ohio St. 165, 157 N.E. 557 (1927). Therefore, it was appropriate to appoint a receiver to protect the Bank's interest in the collateral which secured the note.

The defendant also takes issues with a statement made by the trial court which allegedly indicated that a "guess work standard" was used to determine whether a receiver should be appointed. The trial judge, in explaining why it was necessary to appoint a receiver stated:

> "So there be no question. I will hear from you in detail, but observe, I can be wrong either way. I can be wrong by appointing a receiver where one isn't necessary, or I can be wrong in not appointing where one is necessary. If I guess wrong in that fashion, I can destroy the collateral security of the lender. It seems to me that if I must make a choice, as to which way to err, I'm better off to err in protecting this collateral, rather than not protect it."

This Court does not object to the trial court's language. Placed in its proper context, it is obvious that the judge's statement was in reference to the balancing of equities that must take place before a receiver is appointed to administer and protect property. Moreover, the trial

court made it clear that at any time the defendant had additional evidence on the appropriateness of a receiver, he would schedule a hearing to consider this evidence. Although the defendant has filed a number of motions in the trial court, he has yet to act on the judge's offer to set a hearing.

Accordingly, the order of the Honorable Carl B. Rubin of the United States District Court for the Southern District of Ohio, Western Division, is affirmed.

APPENDIX B

Case No. C-1-83-1547

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

FIFTH THIRD BANK,

Plaintiff

v.

STEPHEN J. HACKER, et al.,

Defendants

(Judge Rubin)

ORDER APPOINTING RECEIVER

(Filed September 26, 1983)

This matter came on for hearing on the Motion of Fifth Third Bank for the Appointment of a Receiver on September 22, 1983 at 2:30 P.M. in the United States District Court in Cincinnati, Ohio before Judge Carl Rubin. The Court having reviewed the Motion and hearing the testimony of George A. Schaefer, Senior Vice President of the Fifth Third Bank, finds that the Motion for Appointment of the Receiver is well taken and does hereby grant same.

It is therefore ORDERED THAT:

Robert O. Edington,
Attorney at Law
1650 Atrium One,
201 East Fourth Street
Cincinnati, Ohio 45202

is appointed Receiver of the property interests of Stephen J. Hacker in certain thoroughbred horses, listed in Exhibits "A" and "B" attached to this Order. The Receiver has the authority to preserve, protect, and collect all the horses, certificates evidencing ownership of the horses or undivided fractional ownership shares in the horses listed in Exhibits "A" and "B" attached to this Order and young of the horses, and the products and proceeds of the horses.

The Receiver is specifically authorized to collect all monies held by any party arising from the sale, racing, sale of breeding seasons or otherwise directly or indirectly related to the horses listed on Exhibits "A" and "B" attached.

It is further ORDERED that Robert O. Edington shall post a bond of $100,000 with this Court.

/S/ Carl B. Rubin
JUDGE CARL B. RUBIN

/S/ LOUISE M. ROSELLE
REISENFELD & ASSOCIATES

By: Louise M. Roselle
Attorney for Plaintiff
Auburn Barrister House
2355 Auburn Avenue
Cincinnati, Ohio 45219
(513) 381-6810

FREDERICK J. McGAVRAN
Attorney for Defendant
2500 Central Trust Center
201 East Fifth Street
Cincinnati, Ohio 45202

EXHIBIT "A"

Steve's Jewel
'81 Joachim/Steve's Jewel Filly
Pretty Sunny
'82 Codex/Pretty Sunny Filly
Jaka's Lady
'82 Diamonds Are Trump/Jaka's Lady Colt
Smile Pretty
Distortion
'81 New Prospect/Smile Pretty Filly
'82 Vagaries/Smile Pretty Filly
Coin Prospector
Born to Reason
Continental Suit
Kissonthewips
Hack's Flash
Vitus Dancer
New Ripple
'81 Distinctive/New Ripple Filly
'82 Diamonds are Trump/New Ripple Colt
March Pane
'82 Riverman/March Pane Colt
Balsane
'82 State Dinner/Balsane Filly
Hemostat
First Sea Lord
'81 Stage Door Johnny/Chimmy Filly
Hill Daisy
Scott's Babe
Fey
Bubbly Beginning
Treasury Dip
Come Up Pence
Zulu Fire
'81 North Sea/Zulu Fire Filly

EXHIBIT "B"

NAME SYNDICATE	NUMBER SHARES	VALUE
DIAMONDS ARE TRUMP	4	$ 76,000.00
HOLD YOUR PEACE	1	$ 55,000.00
VAGARIES	1	$ 16,000.00
RIVERMAN	1	$500,000.00
PLUGGED NICKLE	1	$275,000.00
TRUE COLORS	1	$ 25,000.00
STATE DINNER	1	$200,000.00
CODEX	1	$155,000.00
MUSCOVITE	1	$ 75,000.00
ARGUMENT	1	$150,000.00

APPENDIX C

C-1-83-1547

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

FIFTH THIRD BANK,

Plaintiff,

vs.

STEPHEN J. HACKER, *et al.*,

Defendant.

Before:

The Honorable Carl B. Rubin
Chief Judge
Cincinnati, Ohio

HEARING ON MOTION TO APPOINT RECEIVER
SEPTEMBER 22, 1983
IN CHAMBERS CONFERENCE
SEPTEMBER 23, 1983

APPEARANCES:
ON BEHALF OF THE PLAINTIFF:
Sylvan Reisenfeld, Esq.
Louise Roselle, Esq.
George Schaefer

ON BEHALF OF THE DEFENDANT:
Frederick McGavran, Esq.

Linda M. Kuppin,
Official Court Reporter

**CIMMARON Computer-Aided
Transcription**

THURSDAY AFTERNOON SESSION

SEPTEMBER 22, 1983

PROCEEDINGS

BEFORE THE COURT:

The Court: This is the matter of Fifth Third Bank versus Stephen Hacker, 83-1547.

It's my understanding that the plaintiff is seeking the appointment of a receiver.

Mr. Reisenfeld, can you tell me something about this case?

Mr. Reisenfeld: If I may, if it please the court, this action arises out of a promissory note that was executed by the defendant on November first, and a statement Mr. Hacker executed in favor of the bank, a security agreement, which, in fact, contained a list of thoroughbred horses and various by-products that come from these horses.

In toto—

The Court: Excuse me. That's an odd statement. The ability to sell shares in mating mares?

Mr. Reisenfeld: Yes, and what is known as seasons. Whenever you have shares of thoroughbreds with syndications involved, there are certain seasons involved.

The Court: As I understand it, a share entitles you to nominate a mare, depending on the number of shares. Are these horses all stallions?

Mr. Reisenfeld: All stallions and mares. We had thirty-five separate mares that were listed on the se-

curity agreement, which has caused a great deal of problems and the reason that we are here today, as well, if Your Honor please.

Throughout the time from November first until the time that his loan became in default, which was in May of 1983, the bank has worked diligently, through Mr. Hacker's counsel, and through its own counsel to try to achieve some sort of a work out of the problem. There is, as you will note in the suit filed in this case, a total due and owing the bank of two million three hundred thousand dollars plus.

The matter has been in default since May, and in June of 1983, again, through the intervention of counsel, Mr. Wachs, who is a member of the law firm representing Mr. Hacker today, a new letter of agreement, a new letter of intent was put into effect, whereby, Mr. Hacker had agreed to, in an orderly fashion, allow the bank to start selling some of the collateral.

The bank at that time found out that, of those horses listed in the security agreement, a number of them had already been sold in January of 1983.

The security agreement specifically called for a security interest in the proceeds of the collateral as well as the collateral itself.

I want Your Honor to know that there had been a few payments, all interest, from the time of the June 23rd attempted work out until the present time, there was a total of, I believe, about $142,000 paid all to interest to take care of the past due interest.

What facilitated the bringing of the action yesterday and the motion for receivership was primarily a finding by

the bank that the seasons that were involved were, in fact, sold by Mr. Hacker, a short period ago, and it is the understanding of the bank that he is to receive approximately three hundred thousand dollars in cash for those seasons and it is our belief that that money will be due to him sometime during the month of September of 1983.

It is also a problem in that on two specific occasions, Mr. Hacker asked the bank for permission to and for its cooperation in sending certain syndication shares and certain certificates of ownership to two racetracks in the United States. One at Arlington, and one, I believe, at Belmont, for two specific racehorses, the problem being that, unless the racetracks receive these certificates, these horses are not permitted to run at the tracks.

In good faith, the bank did, in fact, send the certificates to the respective racetracks, and now, once we have reached a position where we have no cooperation whatsoever from Mr. Hacker in trying to achieve the work out that was entered into on June 23, 1983, we find that the racetracks will not send back the certificates, because they are, as they feel, caught in a very awkward position. They are serving two masters as such. Mr. Hacker, who is saying, "Don't return them." At least that's what our understanding is, and the bank saying, "We sent them to you in good faith, now return them."

We believe that, in that respect, a receiver is necessary to at least have a court order and some portfolio, if you will, to go to these racetracks and collect back the certificates that belong to the bank.

The Court: What effect do these certificates have if they remain outstanding?

Mr. Reisenfeld: Without the certificates the bank has no control of its collateral; without the certificates the bank has no ability to sell any of its collateral.

The Court: Okay. These certificates release a right in these horses?

Mr. Reisenfeld: The certificates is, in fact, very much like a certificate of title to an automobile. It is the certificate of ownership for the particular interest in either the stallion or the mare or thoroughbred or whatever the case may be.

The Court: Mr. Reisenfeld, I have only a very general knowledge. I would not want it thought that I'm that familiar with racetracks, but I'm aware of something called a claiming race. I assume that what you are suggesting is that it would be possible to put these horses into a claiming race and someone else claim them, and, thereby, obtain good title.

Mr. Reisenfeld: Judge, I would think so. I will be perfectly honest with you. I'm not sure of the answer but I do have a witness present today who is an expert in that area and who is ready, willing and able to testify in regard to those type of questions. I do not profess either to be an expert in this area. But I would suspect you are correct.

The Court: The reality at this point is that there is collateral security for this loan and the collateral might be in some danger.

Mr. Reisenfeld: We think it is in imminent, total danger, yes, your Honor. We would indicate to the court that we know that the general rule, and I'm sure Mr. Mc-

Gavran is going to argue that the notice issue is a problem. We just filed this yesterday afternoon and, quite frankly, we just gave notice early this morning, first thing this morning to Mr. Wachs that this motion of receivership was filed, but we believe that there is a great amount of authority where the court can appoint a receiver, without the notice requirement, both Sixth Circuit cases, as well as Ohio cases, and we believe, in that accord, that it's important that we have the protection that we seek in this matter today.

The Court: Mr. Reisenfeld, I'm aware of an axiom that I thought that bankers followed. "Never invest in anything that eats." I'm mildly curious, is it customary for banks to lend money on racehorses?

Mr. Reisenfeld: Again, Your Honor, I have Mr. Schaefer here today who is Senior Vice President of Fifth Third Bank. I think he would be better qualified to answer that.

The Court: It really doesn't matter. I was just mildly curious. This isn't what you would ordinarily expect a bank to lend money on.

Mr. Reisenfeld: Sometimes it's the only thing that is available in collateral and sometimes that's better than nothing, and I suppose that might have been the case in this situation.

The Court: Mr. McGavran, I will hear from you.

Mr. McGavran: Your Honor, please, counsel, Your Honor, we were notified, as Mr. Reisenfeld said, of the complaint and the motion and the hearing about nine

o'clock this morning. I filed a motion for a continuance, stating —

The Court: Which I am denying, Mr. McGavran. So there be no question. I will hear from you in detail, but observe, I can be wrong either way. I can be wrong by appointing a receiver where one isn't necessary, or I can be wrong in not appointing one where one is necessary. If I guess wrong in that fashion, I can destroy the collateral security of the lender. It seems to me that if I must make a choice, as to which way to err, I'm better off to err in protecting this collateral, rather than not protect it.

While I recognize, this is very short notice, and I'm perfectly willing to set a subsequent hearing, I really have some concern about what has been expressed. Are these facts essentially correct?

Mr. McGavran: Let me say several things, if I may, Your Honor. I understand the court has denied my motion. If I may just make one observation, and that is, if the court does appoint a receiver, and it turns out at a subsequent time that the appointment was incorrect, the effect of appointing a receiver on assets of any businessman has tremendous consequences that can go far beyond the scope of the action, and —

The Court: For the value of a racehorse as distinguished from physical assets of the company is something entirely different. The value of a racehorse, I would assume, is on its speed, and in the case of the stallions, their bloodlines for purposes of stud. I can't see how either of these things are affected by the appointment of a receiver.

Mr. McGavran: I didn't make myself clear. A businessman has a receiver appointed for certain of his as-

sets. I am not familiar with Mr. Hacker's businesses. I don't know what his credit agreements are. I believe that in some credit agreements, it may well be a provision that an appointment of a receiver will be an event of default under agreements other than those with the Fifth Third Bank.

I am simply suggesting to Your Honor that the consequences of what is done in appointing or not appointing a receiver may be tremendous and be tremendously detrimental to Mr. Hacker and his business. I cannot stand here and point to the chapter and verse of Mr. Hacker's affairs, because I got into this this morning and I don't know. I'm stating that the consequences to my client may be every bit as tremendous as they may be to the Fifth Third Bank.

I also would say to the court that this complaint and this motion and this affidavit didn't tell me what Mr. Reisenfeld just said. That cannot be abstracted from a conclusory allegation in this affidavit or in this motion, which I do not know, standing before the court, under what section of Ohio law we are proceeding. I don't know from these papers whether we are going under 2735.01, I don't know if this has something to do with fraudulent conveyances under Chapter 1356 and 7 or 1336. I don't know whether we are after a pre-judgment attachment in 2715.

The Court: Let's leave it at this, Mr. McGavran. I don't think that's too significant. I think the sole question here is one that's addressed to traditional equity powers. Here is a lender with collateral security that's in danger and there is some basis, from what Mr. Reisenfeld has said, of what has already occurred, that would place this lender collateral in danger. All these things are somewhat

ephemeral. They may occur; they may not occur. But here is a practical situation. Your client, unless you are prepared to rebut this, accepted some money that should have gone to the bank and didn't remit it.

He has sold horses that are listed on this collateral. He has reduced the security, or at least at this particular point, there is an appearance that that's been done. Isn't that where the equity powers of a court are traditionally invoked?

Mr. McGavran: Well, Your Honor, the equity power is an extraordinary power.

The Court: Equity itself is extraordinary. Theres' no legal remedy, that's correct.

Mr. McGavran: What we have here is by this motion, what should be an action on a note and an action — action to foreclose on security has been expanded by the motion into an action to appoint a receiver. That's where we are, and the court asked me, did he sell the horses and not give them money? I don't have Mr. Hacker here. I can't stand here and for him to say whether that happened or it didn't. At best as I know, if horses were sold, the proceeds were expended with the knowledge and the consent of the bank for the preservation of the collateral. I'm in a position of contradicting witnesses without having my client here, and —

The Court: This happens with great frequency, when there is extraordinary relief sought, Mr. McGavran. But the relief itself can be destroyed by delay. The only thing—I liken this to a temporary restraining order. A protection of collateral, simply, everybody stop what you

are doing right now. The court will take jurisdiction and now you want a hearing to dissolve the receivership, I'm available, but at this precise moment, it seems to me that, as a matter of caution, for everybody's protection, this collateral ought to be protected. Apparently, the loan is in default. I don't know what the situation will develop on that, but I simply feel that this isn't as though it's a mortgage on a building that isn't going to move. Horses can be moved. Do you know where these horses are located?

Mr. McGavran: I know where some of them are located.

The Court: Where?

Mr. McGavran: They are located in Florida, I believe one or two are in Chicago and I believe in New York.

The Court: Anything further, Mr. McGavran?

Mr. McGavran: In summarizing what I believe the evidence would be, there will be a dispute as to what horses were covered by the security agreement.

The Court: It could take us months to sort that out, couldn't it?

Mr. McGavran: I really can't answer that, Your Honor.

The Court: How would you—forgive me for using that phrase, but it's been my experience that any time something as complicated as involving two million dollars is concerned, it isn't going to be straightforward. It's going to take a long time to sort things out, and if the allegation is which horses were covered and which were

not and when were they covered, that's all the more reason, it seems to me, to make sure we preserve everything so nothing further happens.

Mr. McGavran: Secondly, I would say that any disposition of the assets that has happened, has been, I'm repeating myself, was done with the knowledge and consent of the bank. I would pick up on a statement that Mr. Reisenfeld made, the filing of this suit came out of the blue while negotiations with my partner, Jim Wachs, were in progress. It would seem to me that as a result of a phone conservation we had with Mr. Hacker this morning that much of this matter could be taken—could be disposed of by a negotiation among counsel rather than by order of the court, and having said that, if the court is going to proceed, I would need, I did not ask Mr. Wachs to come over. He was involved in a meeting all day that had been previously set. If I may have your permission to have perhaps a five minute break, I would like to have him over here, because he's been involved in the negotiations and in lieu—

The Court: Mr. McGavran, I'm not willing to prolong this. I do not propose to hear evidence. I propose instead to set this down for a full hearing at a time that is convenient, but, likewise, to appoint a receiver right now, and make sure that this is retained in its present status.

It may well be that you can establish that this has been done wrongfully or maliciously, and your client may have a substantial damage suit against the Fifth Third Bank for proceeding in this fashion, and for misleading the court and for causing him great damage. You know,

that right is always preserved to him. But I'm faced at this point with the opportunity to make a mistake, either way. It seems to me that the remedies that are available are such that if I must make a mistake, I better make a mistake in protecting this collateral rather than to let it alone.

If you wish a time for a hearing, if you want to conduct any discovery in the meantime, I'm sure we can accommodate you.

Mr. McGavran: If I heard Your Honor correctly, the court is going to appoint a receiver.

The Court: Yes.

Mr. McGavran: Without hearing evidence?

The Court: That's correct. At this particular point, today, I'm going to appoint a receiver, simply to keep this matter in status quo.

Mr. McGavran: May I make two points, Your Honor?

The Court: Sure.

Mr. McGavran: The first, with respect, I must assert my client's objection to the appointment of a receiver on nothing more than a conclusory affidavit and statement of counsel.

The Court: Alright. I will hear the testimony of the gentleman from the Fifth Third Bank and you may interrogate. Mr. Reisenfeld, you may proceed.

Mr. Reisenfeld: If Your Honor please, we'll call Mr. George Schaefer.

GEORGE A. SCHAEFER, JR., the witness, having been duly cautioned and worn, testified under oath as follows:

Direct Examination

By Mr. Reisenfeld:

Q. For the record, Mr. Schaefer, would you tell the court your name and spell your last name, please?

A. George A. Schaefer, Jr., S-c-h-a-e-f-e-r.

Mr. McGavran: If Your Honor please, Mr. Reisenfeld earlier said there may be another witness in the courtroom. I would move for a separation of all witnesses.

The Court: All persons in this courtroom who will be called upon to testify who are not seated at counsel table are directed to leave the courtroom at this time and remain outside until summoned. You may proceed.

By Mr. Reisenfeld:

Q. By whom are you employed, Mr. Schaefer?

A. The Fifth Third Bank.

Q. In what capacity are you employed there?

A. I'm Senior Vice President and Loan Officer there.

Q. Are you familiar with Stephen J. Hacker?

A. Yes, I am.

Q. Tell the court how you became familiar with Mr. Hacker.

A. Mr. Hacker has been a client of the bank for approximately ten years and I was the loan officer handling his relationship with our bank.

Q. In November of 1982, was there a note and security agreement executed by Mr. Hacker in favor of the bank?

A. Yes, there was.

Q. Approximately what was the amount of money of that particular promissory note?

Mr. McGavran: I object.

The Court: Overruled.

The Witness: The note was approximately two million three hundred and forty-five thousand odd, I believe.

Q. In addition to the note, there was a security agreement?

A. Yes, there was.

Q. What was the collateral for the security agreement

Mr. McGavran: I object.

The Court: Overruled.

The Witness: The collateral was certain stallions syndicate shares and certain mares, certain race horses.

Q. Mr. Schaefer, did you have an opportunity to discuss this particular loan with Mr. Hacker on a number of occasions?

A. Yes, I did.

Q. When did the loan become in default?

A. The loan became —

Mr. McGavran: Object.

The Court: Overruled.

The Witness: The loan became in default on May 31, 1983. That was when the note was due. It was not paid.

Q. Either prior to that time or just after that time, did you have an occasion to go to Florida to visit Mr. Hacker?

A. Yes, I did, at the end of May, I believe it was May 28, I'm not certain of that date, I traveled to Winterpark, Florida to discuss this with Mr. Hacker.

Q. What was the purpose of your going down there?

A. To visit with him face-to-face and sit down and explain the seriousness of the problem and that we needed some action. We were vitally concerned and wanted to get our money paid back to us in accordance with the terms of the note.

Q. The various mares that were listed on the security agreement, do you recall approximately how many mares there were?

A. Originally, there were 35 mares listed on that agreement. I believe it was 35. We have a listing.

Q. What if anything did Mr. Hacker tell you in regard to those mares when he gave them to the bank as collateral?

A. These were given to the bank because the bank expressed an interest that if we were going to continue the relationship, we wished to have collateral. He gave us these as collateral, and indicated that their value was sufficient protection for our note, to the note we had outstanding.

Q. Subsequent to the issuance and execution by Mr. Hacker of the security agreement to the bank listing the 35 mares, what if anything did you find out about the existence of the 35 mares?

A. I don't understand the question.

Q. Did you find out that — did you ever find out that there were less than 35 mares available of those that were listed on the security agreement?

A. Yes, we did.

Q. The ones that were missing, did you ever find out what had happened to them

A. We were given some accounting. Never a detailed accounting. We were given a listing that indicated that—

Mr. McGavran: I want to object. This is hearsay, Your Honor.

The Court: It may well be but you are entitled to interrogate, Mr. McGavran. At this particular point, I've got to make a decision and I'm perfectly satisfied to accept this evidence. Objection overruled. Proceed.

The Witness: We did receive a listing that some of the collateral had been sold. We have got a copy in our file of that list. Other collateral, in effect, disappeared,

we did not know where the collateral, what happened to the collateral.

Q. Do you know where the collateral is today?

A. No, we have made repeated attempts to get the certificates of full registration that we need. We have asked that they be sent to us. We have attempted for the last three and a half months to work with the client in liquidating the collateral and have not been able to. That's why we are here today.

Q. Mr. Schaefer, did you specifically write to Mr. Hacker requesting the certificates for these various horses?

A. On more than three occasions.

Q. What response did you receive on each occasion?

A. It was continual delay. We did receive one or two of the certificates out of the 35, but never received the 35 original, full certificates.

Q. Of the total 35 mares that were listed, how many of those certificates do you have in the bank today?

A. I believe we have only two or three of those today.

Q. Were any of the certificates sent to racetracks in the United States?

A. Yes, I personally sent —

Q. How many?

A. At least two of those, one to Belmont and one to another, I forget the name of the other track in New York. At Mr. Hacker's request.

The Court: Out of the 35, you sent two to racetracks and you have two to three in the bank, you are missing thirty, aren't you?

The Witness: Yes.

The Court: Did you ever have them?

The Witness: No.

The Court: Okay.

By Mr. Reisenfeld.

Q. Now, —

The Witness: If we would have had them, the collateral could not have been sold and that is one of the problems.

By Mr. Reisenfeld:

Q. Now, Mr. Schaefer, are you familiar with the term seasons?

A. Yes, I am.

Q. What is your understanding of what seasons are?

A. The season is the breeding right for the user of the stallions. That's my understanding.

Q. Were you told by Mr. Hacker at the time he executed the security agreement that as part and parcel of your collateral that you would also be receiving seasons?

A. It was our understanding that when we took the collateral, in accordance with the security agreement, that we had the rights to that collateral and the products and proceeds of that collateral. In other words, if we have collateral, Your Honor, that eats, we have the right to the foals and colts.

Q. Were you recently made aware of the fact that Mr. Hacker, in fact, had sold these seasons?

A. Yes, yes, I was.

Q. Did he tell you that?

A. No. We found out through our own investigation.

Q. Were you surprised by that fact?

Mr. McGavran: I object, Your Honor.

The Court: Sustained.

By Mr. Reisenfeld:

Q. Do you know whether or not Mr. Hacker has received the proceeds from those seasons?

A. I do not know whether or not he has received the proceeds. I had a conversation with Mr. Hacker whereby he indicated he was going to receive some proceeds from those sales.

Q. When were those proceeds to be received, during what month?

A. In September of this year.

Q. How much are the proceeds that he's to receive from the seasons?

A. We do not know for certain. It's in the hundreds of thousands of dollars figure.

Q. In June of 1983, did you have a discussion with counsel for Mr. Hacker?

A. Yes, I did.

Q. Was that Mr. Wachs?

A. Yes, it was.

Q. As a result of that discussion, was there a letter of agreement that was entered into between the bank and Mr. Hacker through counsel?

A. Yes, there was.

Q. And what was the basis or what was the premise of that particular agreement in June of 1983?

Mr. McGavran: Your Honor, I object. The document speaks for itself.

The Court: Overruled.

The Witness: The basis of that agreement is that we would work together in order to liquidate the collateral, specifically, that if we found a buyer for a stallion share or a horse, we would present that fact to Mr. Hacker, through Mr. Wachs, for example, on racehorse "Hold Your Piece", [sic] we have an offer for forty thousand dollars. At that point in time, Mr. Hacker had fifteen days to either find a better offer for that, or to give us, to agree with us to go ahead and liquidate the collateral. And that was the agreement for all the horses that we held.

Q. As a result of conversations with Mr. Wachs, were you aware of whether or not Mr. Wachs had possesion of a certificate for "Hold Your Piece" [sic]?

A. I'm now aware that Mr. Wachs had that certificate. He had the papers on "Hold Your Piece", [sic] that stallion syndication.

Q. Was there an agreement that the bank would receive forty thousand dollars, which was the purchase price for the "Hold Your Piece" [sic]?

A. Yes, that was stated by Mr. Wachs and Mr. Hacker to me.

Q. Has the bank received that forty thousand dollars as of today?

A. No, it has not.

Q. Was one of the other stallions involved a stallion called "River Man"?

A. Yes, it was.

Q. Was the bank able to obtain a purchaser for the "River Man"?

A. Yes, we were.

Q. What was the amount of money that the bank was to receive for "River Man"?

A. It was approximately $350,000.

Q. After receiving that particular offer, was the bank advised by counsel, Mr. Hacker's counsel, or Mr. Hacker that there was an offer in excess of the $350,000?

A. Yes, it was. He stated he had a better offer than that.

Q. Have you ever seen anything in writing to that effect?

A. No, we have not. In fact, the original agreement called for fifteen days. We gave Mr. Hacker sixty days to come up with a better offer because it was in his best interest and ours to find more money for our collateral and we tried our best to do it and could not.

Q. Wouldn't the bank be able to sell "River Man" with the present documentation that the bank has?

A. I believe it would, yes.

Q. Does the bank have a certificate for "River Man", to the best of your knowledge?

A. We have a file of ownership papers for "River Man".

Q. Do you know whether or not the prospective owner needed cooperation from Mr. Hacker or requested cooperation from Mr. Hacker?

A. Yes, he did.

Q. Did you discuss that with Mr. Hacker?

A. Yes, we did.

Q. Did you receive whatever cooperation was necessary from Mr. Hacker?

A. No, Mr. Hacker continually stated that he had a better offer and that it was continually forthcoming, which it never occurred.

Q. Was this also true with other stallions?

A. Yes, it was.

Mr. Reisenfeld: You may inquire.

The Court: Mr. McGavran, do you wish to interrogate?

Mr. McGavran: I do, Your Honor. I repeat my request to have a five minute recess while I get Mr. Wachs over here.

The Court: If it wasn't important enough to have Mr. Wachs to be here, I'm not going to take a recess. If you wish to interrogate feel free, if you don't wish to, I don't care.

CROSS-EXAMINATION

By Mr. McGavran:

Q. Did you bring with you, sir, the security agreements and the descriptions of collateral to which you have referred in your testimony?

A. Yes, I believe Mr. Reisenfeld has a copy of those. I do not have a copy on my person.

Mr. McGavran: May I see them, sir? Your Honor, may I hand the clerk a document and ask her to mark it as Defendant's Exhibit 1 for identification, please?

The Clerk: Defendant's Exhibit A, sir.

Mr. McGavran: Thank you.

Q. The clerk has handed you a document marked for identification as Defendant's Exhibit A. Would you identify that, please, if you can?

A. Defendant's Exhibit A is a copy of an affidavit listing the Fifth Third Bank as plaintiff vs. Stephen Hacker and S.J.H. Enterprises, Inc. as defendants.

Q. Do you find attached to that a copy of a certain security agreement that bears the date November 1, 1982?

A. Yes, I do.

Q. Is that the security agreement to which you've been referring in your testimony, sir?

A. That is correct.

Q. Mr. Schaefer, I saw in a reference in the complaint that your bank filed in this action, a reference to another security agreement dated June of 1982. Do you have a copy of that, sir?

A. Not in this packet of information I do not.

Q. Is it in the courtroom someplace so we may see it?

Mr. Reisenfeld: May it please the court, I'm more than willing, I'm looking at the complaint and I don't see any reference to June of 1982. I'd be more than happy to make available to Mr. McGavran whatever we have.

The Court: Was there a second security agreement, was there a previous security agreement?

The Witness: There have been numerous security agreements with Mr. Hacker through the years, yes.

Q. I invite your attention to the exhibits attached to the security agreement.

The Court: Excuse me. Which security agreement?

Mr. McGavran: I'm speaking of the one that is attached to Defendant's Exhibit A, Your Honor.

The Court: November first, 1982 security agreement?

Mr. McGavran: Yes.

Q. Do you find attached to that a document marked Exhibit A?

A. Yes, I do.

Q. Do you find in back of that, Mr. Schaefer, what appears to be a copy of a note with handwriting on the top and then the names of what apparently are four horses; do you have that, sir?

A. I have the copy of Exhibit A marked a note for $2,395,000, is that what you are referring to?

Q. No, I'm asking if in that package of material someplace you have attached documents that were exhibits to the security agreement dated November one, '82?

A. Yes.

Q. Do you have up at the top, it says Exhibit A and says "Steve's Jewel"?

A. Yes.

Q. Could you go to the next page? Do you have what appears to be a copy of the note with handwriting?

A. Yes, a small, not a legal note, but a memo, yes.

Q. My question to you, sir, is were these two documents, the Exhibit A and the handwritten note attached to the November one, '82 security agreement when Mr. Hacker signed it?

A. The Exhibit A was and the Exhibit B was. I'm not certain whether this note was attached to that or not, sir.

Q. Do you know whose handwriting on the note says, "The following four are missing from list"?

A. I'm not certain whose handwriting that is. I believe it may be my secretary's handwriting but I'm not positive. It may be Mr. Hacker's secretary also.

Q. If you look at the Exhibit A list, Mr. Schaefer, you find that the names of the horses on that little note do appear about two-thirds of the way down, don't they, "March Pain", "'82 River Man", "Bell Sane" and "'82 Steak Dinner"?

A. Yes, they do.

Q. Was Exhibit A retyped after receipt of this note that says these following four are missing from list?

A. I'm not certain of that.

Q. Isn't it a fact that the Exhibit A list is different from the Exhibit A list that was attached to the security agreement when Mr. Hacker signed it?

A. No, there may have been, and I'm not certain because I don't have the documents in front of me, previous security agreements in which we held certain horses as collateral.

Q. Well, that wasn't my question, sir. Would you read my question?

(Question read as requested.)

The Witness: No, I do not believe it was.

By Mr. McGavran:

Q. Is the Exhibit A the list of 35 mares to which you referred in your testimony?

A. Yes, but there are approximately 35 on there or 34, or 35.

Q. Looking at this list, if you go to the third one down, "Pretty Sunny", isn't it true that that horse was sold with your knowledge and permission and the proceeds applied to seasons or upkeep for the horses?

A. I do not—please ask that question again.

The Court: Read the question.

(Question read as requested.)

The Witness: We found out that this horse was sold; after it was sold, okay, we did not receive the total proceeds from the sale of this horse.

Q. Well, isn't it true that the proceeds were applied for seasons and for upkeep of the horses?

A. I do not know where the proceeds that we did not receive were applied.

Q. You did receive part of the proceeds?

A. We did receive a portion of the proceeds for interest on the notes.

Q. Looking at the next horse, "82 Codex", you are aware, are you not, that that horse died?

A. Of the list, I'm not intimately familiar with every horse on this list without the files that we have on them. It may have died, yes. We did not receive the insurance proceeds from that.

Q. Have you requested them?

A. Yes.

Q. When?

A. Throughout—from the time the collateral was pledged on at least three occasions, we have written to Mr. Hacker between November of '82 and September of this year, requesting that we have full right and title to all these horses, plus the insurance proceeds. We do have

the insurance on some of those. We do not have them on all of them.

The Court: What is the name of that horse that died?

Mr. McGavran: "'82 Codex".

The Court: Spell it.

Mr. McGavran: '82 C-O-D-E-X.

Q. You have not specifically requested the insurance proceeds of this horse, though, have you?

A. No, I'm not certain that this horse died, as I stated, there was a horse or two that died that we did not receive the insurance proceeds on.

Q. Isn't it true that the next horse, "Jacka's Lady" was sold at an OBS sale with your knowledge and consent?

A. We found out about the sale of this horse after it occurred. Let me state the answer this way. We have continually requested that Mr. Hacker liquidate the collateral and apply it to our note. That has not been done consistently. It has been done partially, extremely rarely, that he has sold them and given us the proceeds. That, I believe, is why we are here today.

Q. You can't testify that you were given none of the proceeds of "Jacka's Lady"?

A. No, we were paid a certain amount of the interest due on our note from the sale of certain of these animals.

The Court: Have you been paid anything on the principal?

The Witness: We have been paid a minor amount on the principal. I believe it is 25 or 50 thousand dollars in the past year and a half.

By Mr. McGavran:

Q. Isn't it true that "Distortion" was sold with your permission?

A. These horses, we have been pleading with Mr. Hacker to sell the horses, okay. We did not find out about the sale 'til after it occurred. We did not receive the direct proceeds from this sale. We did not control the proceeds of the sale.

Q. Well, the fact is, you asked him to sell it and he sold it, right?

A. That's correct.

The Court: Isn't it reasonable that the request to sell also included remission of the proceeds? The collateral security is reduced each time a horse is sold. Wouldn't you expect that then a portion to reduce the debt would likewise occur?

Mr. McGavran: Your Honor, as I said—

The Court: Your questions, Mr. McGavran, I don't quite understand them. The witness has now testified three times that they've asked him to liquidate the collateral, but not just liquidate the collateral, liquidate it and pay off the note.

Mr. McGavran: Your Honor, what we are missing due to, and I must again confess insufficient preparation, is knowledge of the amount of the sale, the value of

the horse, and we concede that what to me are large sums of money were remitted to the bank as interest.

The Court: Yes, but that isn't sufficient, Mr. McGavran. If you have a hundred trucks as collateral for a five million dollar loan and you sell fifty trucks, I don't think you can justify your position by saying, well, we paid the interest. The answer is you've reduced the collateral security by fifty percent but you haven't reduced the note by fifty percent. All I'm receiving from this witness is more and more conviction that there is a purpose to be served in the appointment of a receiver.

Mr. McGavran: Well, I would point out, Your Honor, with all respect, that without knowing the amount of the proceeds from the sale, we simply cannot say whether all or none of the proceeds were remitted and without other evidence, we cannot say that the balance of the proceeds was not applied to the care and feeding of the other collateral. I'm just saying we can't say that.

The Court: The obvious answer is that the debtor is insecure. Collateral is being disposed of and no payments on the note, or very, very minor payments on the note, unless you are prepared to establish that that's incorrect, and Mr. McGavran, all I can tell you is, you are convincing me more and more that there's some reason to appoint a receiver, maybe for your client's protection as well. Maybe he is entitled to setoffs for the care and feeding of these horses. I can't tell. You may proceed.

By Mr. McGavran:

Q. Do you know whether or not "Kiss on the Whips" was sold?

A. I do not know. It may have been. Again, I don't know the exact status of each of these animals.

Q. How about "Hill Daisy", do you know whether or not "Hill Daisy" was sold?

Mr. Reisenfeld: Objection, I believe the witness has answered at least seven times.

The Court: Sustained.

By Mr. McGavran:

Q. Look at what is Exhibit B to the security agreement; do you have that?

A. Yes, I do.

Q. Is this the list of syndicates to which you referred in your testimony when you were questioned by Mr. Reisenfeld?

A. Yes, sir, it is.

Q. Do you know whether or not the syndicates have been transferred to the bank's name or the bank has been nominated?

A. I do not know whether or not we have been nominated. We were given a packet of papers on each of these stallions syndicates by Mr. Hacker, which he proposed were the ownership certificates and yes, we have the files that he had in our possession now.

Q. Is it your testimony that the bank is or is not able to sell interests in these syndicates with the documents in its possession?

A. It is our position that we are able to sell these stallions syndicates which we have.

Q. These have already been sold, sir?

A. No, they have not. None of them have been sold.

Q. Do you have in the courtroom a copy of the June agreement to which you've referred in your testimony?

A. A copy of the June, 1983 agreement?

Q. Yes, Mr. Schaefer.

A. Yes, we do. Mr. Reisenfeld has it.

Mr. McGavran: Thank you.

The Court: Mark it, please.

The Clerk: Defendant's Exhibit B.

Mr. McGavran: May I see it for a moment, please?

The Court: Of course.

Mr. McGavran: Thank you, Your Honor, I have no further questions.

The Court: Anything further of this witness?

Mr. Reisenfeld: Nothing further.

The Court: Thank you.

Mr. Reisenfeld: If it please the court, I have other witnesses, if the court needs additional testimony.

The Court: No, I'm satisfied that there is some evidence here of insecurity. I think this plaintiff is entitled to the appointment of a receiver and I'm perfectly satisfied, upon request of the defendant, to set this matter for a full dress hearing on terminating the receivership, but I suggest to counsel, once again, I have a choice of

ways I can be wrong. If I must choose, I'm going to choose a way I think will protect the parties, rather than potentially damage it.

Accordingly, the motion for the appointment of receiver will be granted. I propose to appoint Robert Eddington, attorney in Cincinnati.

Mr. Reisenfeld, it is my policy that when I appoint a receiver, I do not appoint someone suggested by either party. The receiver is answerable to me and not to the parties.

Mr. Reisenfeld: I have nothing to suggest to the court.

The Court: Mr. Eddington is in the courtroom. Is there any suggestion as to bond that should be imposed?

Mr. McGavran: I would suggest, Your Honor, I've heard the court's ruling and, with all respect, may I make one suggestion that goes to my point about bond? Again, I do not know what other credit agreements Mr. Hacker may be party to and I do not know what appointment of a receiver here may do to his business.

I simply can't tell the court. My suggestion would be if—as the court does find the preliminary relief as warranted, could a temporary restraining order or a preliminary injunction satisfy the court's concern?

The Court: No, no, we are dealing with collateral which is mobile, volatile, alive. No way. So far as I'm concerned, I want these collateral brought under control of the court. It may be for a limited time and I will be perfectly happy to hear from you, but a restraining

order at this point against a person who, incidentally, is not within this district and, apparently, the horses are not either, so far as I'm concerned is not sufficient. Do you have any suggestion regarding bond?

Mr. McGavran: Yes, Your Honor, I think a bond of at least two million five hundred thousand dollars is called for under the circumstances of this case, because the appointment of a receiver for the assets may have grave financial consequences to Mr. Hacker, and I believe that the bond should assure that if it's determined at a later date that the appointment should not have been made, Mr. Hacker can be justly compensated.

The Court: I don't see that Mr. Hacker can be damaged in the value of the horses. I don't quite follow that logic. Mr. Reisenfeld.

Mr. Reisenfeld: I would only suggest that the purpose of a bond is not to protect Mr. Hacker in the event that he's been harmed. That would certainly be the bank's responsibility, and the last I heard, they were not consulted. I would suggest to the court that a nominal bond would be in order so as not to put great pressure upon the receiver. I would suggest to the court that a fair bond of fifty to a hundred thousand dollars would be more than sufficient.

The Court: I'm inclined to agree with you, Mr. Reisenfeld. Obviously, the bank, if they have acted improperly and caused damage to Mr. Hacker, they are liable.

Mr. Reisenfeld: Yes, Your Honor, I understand that.

The Court: I'm going to set bond at one hundred thousand dollars. I will direct that momentarily, at least, the premium for that bond be advanced by the Fifth Third Bank. Anything further to come before the court in this matter?

Mr. Reisenfeld: Nothing further.

The Court: Mrs. Anderson.

(Court was adjourned at 4 p.m.)

APPENDIX D

CASE NO.
C-1-83-1547

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

FIFTH THIRD BANK
38 Fountain Square Plaza
Cincinnati, Ohio 45202

Plaintiff,

vs.

STEPHEN J. HACKER
427 South New York Avenue
Winter Park, Florida 32789
and
SJH ENTERPRISES, INC.
427 South New York Avenue
Winter Park, Florida 32789

Defendants.

COMPLAINT

(FILED SEPTEMBER 21, 1983)

COUNT ONE

(1) Jurisdiction is based upon diversity of citizenship pursuant to 28 U.S.C. § 1332. The amount in controversy exceeds $10,000, exclusive of interest and costs.

(2) On or about February 28, 1983, Stephen J. Hacker executed a Promissory Note, payable to the order of Fifth Third Bank in the amount of $2,395,273.92. This Promissory Note was a renewal of an already existing loan to Stephen J. Hacker from Fifth Third Bank. A copy of the Note is attached hereto as Exhibit "A" and incorporated herein by reference.

(3) Defendant J. Hacker is in default on said Note. Notice has been given to Defendant of the default. Defendant has refused to pay the amount due.

(4) There is due and owing to Plaintiff $2,345,273.92 principal plus interest at the rate of 11½% per annum from August 1, 1983.

COUNT TWO

(5) Paragraphs one through four are incorporated herein as though fully rewritten.

(6) On or about April 13, 1979, in consideration of the loan given to Defendant Stephen J. Hacker by Fifth Third Bank, Defendant SJH Enterprises, Inc. executed an "Unlimited Payment Guaranty" whereby it agreed to guarantee the prompt payment of all monies due under the Note executed by Defendant Stephen J. Hacker to Plaintiff. Said Guaranty was absolute and unconditional. A copy of said Guaranty is attached hereto as Exhibit "B" and incorporated herein by reference.

(7) Defendant SJH Enterprises, Inc. is in breach of its Guaranty of payment to Plaintiff of the Note which was executed by Defendant Stephen J. Hacker to Plaintiff in that said Note is overdue and remains unpaid.

(8) Demand for payment has been made upon SJH Enterprises, Inc. and no payment has been received from SJH Enterprises, Inc.

(9) There is due and owing to Plaintiff by reason of said breach, $2,345,273.92 principal plus interest at the rate of 11½% per annum after August 1, 1983.

WHEREFORE, Plaintiff demands judgment in the amount of $2,345,273.92 plus interest at the rate of 11½%

per annum on Count One; $2,345,273.92 plus interest at the rate of 11½% per annum on Count Two, plus interest, costs, and all other relief to which Plaintiff is justly entitled.

Respectfully Submitted,

REISENFELD & ASSOCIATES
/S/ LOUISE M. ROSELLE
LOUISE M. ROSELLE
Attorney for Plaintiff
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OF COUNSEL:

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(513) 381-6810

APPENDIX E

CASE NO. C-1-83-1547

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

FIFTH THIRD BANK,

Plaintiff

vs.

STEPHEN J. HACKER and
SJH ENTERPRISES, INC.,

Defendants

MOTION FOR APPOINTMENT OF RECEIVER

(Filed September 21, 1983)

Now comes Plaintiff, by and through its counsel, and respectfully moves this Court for an order appointing a receiver to take control and custody of Defendant Stephen J. Hacker's property, and in support of its Motion, alleges the following:

(1) Jurisdiction is based upon diversity of citizenship pursuant to 28 U.S.C. §1332. Amount in controversy exceeds $10,000, exclusive of interest and costs.

(2) On or about February 28, 1983, Defendant Stephen J. Hacker executed a Promissory Note payable to the order of Plaintiff in the amount of $2,395,273.92. This Promissory Note was a renewal of an already existing loan to Stephen J. Hacker from Fifth Third Bank.

(3) As collateral for the loan, Defendant Stephen J. Hacker gave Plaintiff a security interest in certain thor-

oughbred horses and undivided fractional ownership shares in certain horse syndicates.

(4) Stephen J. Hacker is in default of payment of the Promissory Note. Notice has been given to Defendant Stephen J. Hacker of the default.

(5) Plaintiff has ascertained that Defendant Stephen J. Hacker is insolvent or nearly insolvent, without sufficient assets to meet the demand of Plaintiff.

(6) Plaintiff has reasonable cause to believe that Defendant Stephen J. Hacker has transferred or will transfer the collateral to third parties in an attempt to defeat Plaintiff's security rights therein.

(7) Plaintiff's rights and interests, as set forth in the Affidavit attached, will be irreparably injured unless a receiver is appointed to take possession and control of the property. A Complaint is being filed by Plaintiff against Defendant in this Court.

(8) Plaintiff is a creditor and has a security interest in the property for which receivership is sought. A copy of the Financing Statement and Security Agreement is attached to the Affidavit attached hereto.

(9) Plaintiff has no adequate remedy at law. The injunctive remedy available in this Court would be inadequate and ineffective.

(10) Plaintiff has tried to work with Stephen J. Hacker towards an orderly liquidation of the collateral, but Defendant Stephen J. Hacker has not cooperated with Plaintiff.

(11) The collateral is located in several states in the United States and is held by third parties. State Court actions would be ineffective in this case.

(12) This Motion is based on Plaintiff's Complaint, a copy of which is attached hereto as Exhibit "A" and on the Affidavit of a representative of Fifth Third Bank, attached hereto.

REISENFELD & ASSOCIATES

/S/ LOUISE M. ROSELLE
LOUISE M. ROSELLE
Attorney for Plaintiff
Auburn Barrister House
2355 Auburn Avenue
Cincinnati, Ohio 45219
(513) 381-6810

CASE NO. _____

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

FIFTH THIRD BANK

Plaintiff

vs.

STEPHEN J. HACKER and
SJH ENTERPRISES, INC.

Defendants

AFFIDAVIT

GEORGE A. SCHAEFER, JR., being first duly cautioned and sworn, deposes and states the following:

(1) That he is a Senior Vice President of Fifth Third Bank, Plaintiff, in this action, and this Affidavit is filed in support of its Motion for Appointment of a Receiver for the property described in said Motion;

(2) That, to the best of Plaintiff's knowledge, the property is in possession of Defendant Stephen J. Hacker or Defendant has access to the subject property;

(3) That Plaintiff has an interest and a right to said property by virtue of a Promissory Note executed by Stephen J. Hacker on or about February 28, 1983; and a Security Agreement executed by Stephen J. Hacker on or about November 1, 1982.

(4) That true and correct copies of the Promissory Note, the Security Agreement, and the Financing Statement are attached hereto and incorporated herein by reference.

(5) That Plaintiff believes it is necessary for the protection of its rights that a receiver be appointed for said property for the reason that Plaintiff has not received the Certificate of Registration for many of the horses from Stephen J. Hacker, despite repeated demands; that Plaintiff believes it has the authority to convey good title, but it is concerned that a prospective buyer might question that; and that Plaintiff has reasonable cause to believe that Defendant Stephen J. Hacker has transferred or will transfer the property to a third party in an attempt to defeat Plaintiff's rights therein and that Plaintiff will be irreparably harmed therefrom;

(6) That Plaintiff has tried to work with Stephen J. Hacker towards an orderly liquidation of the collateral,

but Defendant Stephen J. Hacker has not cooperated with Plaintiff;

(7) That the value of the property for which a receiver is sought is in excess of $500,000.00;

(8) That no previous application for a receiver has been made by Plaintiff.

Further Affiant Sayeth Naught.

GEORGE A. SCHAEFER, JR.

Sworn to before me and subscribed in my presence this — day of September, 1983.

NOTARY PUBLIC

APPENDIX F

Civil Action No. C-1-83-1547

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

FIFTH THIRD BANK,

Plaintiff,

vs.

STEPHEN J. HACKER, *et al.*,

Defendants.

Judge Rubin

MOTION OF DEFENDANTS TO SET ASIDE RECEIVERSHIP AND FOR EVIDENTIARY HEARING

(Filed January 10, 1984)

Defendants Stephen J. Hacker ("Hacker") and SJH Enterprises, Inc. ("SJH") move the Court to vacate the Order Appointing Receiver entered September 23, 1983, on the grounds said Order was entered with inadequate notice and without opportunity for Hacker to present evidence on Defendants' behalf and on the grounds that a Receiver should not be appointed herein. In accordance with Local Rule 4.0.4, Local Rules for the United States District Court, Southern District of Ohio, Defendants move the Court for an evidentiary hearing on this Motion.

/s/ Frederick J. McGavran
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(Certificate of Service Omitted in Printing)

APPENDIX G

Ohio Revised Code §2715.01. Grounds of attachment.

(A) An attachment against the property, other than personal earnings, of a defendant may be had in a civil action for the recovery of money, at or after its commencement, upon any one of the following grounds:

(1) Excepting foreign corporations which by compliance with the law therefore (therefor) are exempted from attachment as such, that the defendant or one of several defendants is a foreign corporation;

(2) That the defendant is not a resident of this state;

(3) That the defendant has absconded with the intent to defraud his creditors;

(4) That the defendant has left the county of his residence to avoid the service of a summons;

(5) That the defendant so conceals himself that a summons cannot be served upon him;

(6) That the defendant is about to remove his property, in whole or part, out of the jurisdiction of the court, with the intent to defraud his creditors;

(7) That the defendant is about to convert his property, in whole or part, into money, for the purpose of placing it beyond the reach of his creditors;

(8) That the defendant has property or rights in action, which he conceals;

(9) That the defendant has assigned, removed, disposed of, or is about to dispose of, his property, whole or in part, with the intent to defraud his creditors;

(10) That the defendant has fraudulently or criminally contracted the debt, or incurred the obligations for which suit is about to be or has been brought;

(11) That the claim is for work or labor;

(12) That the defendant has not complied with the provisions of sections 1306.01 to 1306.09 of the Revised Code, relating to bulk transfers.

(B) An attachment should not be granted on the ground that the defendant is a foreign corporation or not a resident of this state for any claim, other than a debt or demand arising upon contract, judgment, or decree, or for causing damage to property or death or personal injury by negligent or wrongful act.

(C) An attachment against the personal earnings of a defendant, through an action in garnishment of personal earnings, may be granted only after a judgment has been obtained by the plaintiff and only in accordance with Chapter 2716 of the Revised Code.

(D) An attachment against the property, other than personal earnings, of a defendant may be accomplished prior to the entry of judgment only pursuant to an attachment proceeding under this chapter.

An attachment against the property, other than personal earnings, of a defendant that is in the possession of another person, may be accomplished prior to the entry of judgment only pursuant to a garnishment proceeding

under section 2715.091 [2715.09.1] of the Revised Code and related provisions of this chapter.

(E) An attachment against the property, other than personal earnings, of a defendant that is in the possession of another person, may be accomplished after judgment has been obtained only pursuant to a garnishment proceeding under Chapter 2716 of the Revised Code.

Ohio Revised Code §2735.01. Appointment of receiver.

A receiver may be appointed by the supreme court or a judge thereof, the court of appeals or a judge thereof in his district, the court of common pleas or a judge thereof in his county, or the probate court, in causes pending in such courts respectively, in the following cases:

(A) In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject property or a fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff or of a party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and when it is shown that the property or fund is in danger of being lost, removed, or materially injured;

(B) In an action by a mortgagee, for the foreclosure of his mortgage and sale of the mortgaged property, when it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed, and the property is probably insufficient to discharge the mortgage debt;

(C) After judgment, to carry the judgment into effect;

(D) After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied and the judgment debtor refuses to apply the property in satisfaction of the judgment;

(E) When a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights;

(F) In all other cases in which receivers have been appointed by the usages of equity.

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